Supreme Court, U. S.
FILED
MAR 29 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT 142, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL LODGE 1650, *Petitioners*

v.

LARRY G. HARDISON and TRANS WORLD AIRLINES, INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PLATO E. PAPPS
Machinists Building
Washington, D. C. 20036

MOZART G. RATNER
DENIS F. GORDON
JAMES R. BARNETT
1900 M Street, N.W.
Washington, D. C. 20036

MICHAEL D. GORDON
1125 Grand Avenue
Kansas City, Missouri 64106

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

AUTHORITIES CITED

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT 142, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL LODGE 1650, *Petitioners*

v.

LARRY G. HARDISON and TRANS WORLD AIRLINES, INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

International Association of Machinists and Aerospace Workers (IAM&AW), AFL-CIO, its District Lodge 142 and its Local Lodge 1650 pray that a writ of certiorari be granted to review the final judgment of the United States Court of Appeals for the Eighth Circuit holding that Trans World Airlines (TWA) had violated rights granted respondent Hardison by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

PROCEEDINGS BELOW

The opinion of the Court of Appeals is not yet officially reported. It is published at 11 FEP Cases 1121, and reproduced as Appendix A to this petition. The judgment and opinion of the district court, entered on May 15, 1974, appears at 375 F. Supp. 879 (W.D. Mo., 1974), and is reproduced as Appendix B to this petition.

JURISDICTION

The opinion of the Court of Appeals was entered on December 16, 1975. By order dated March 8, 1976, Mr. Justice Blackmun extended the time within which this petition may be filed to March 29, 1976 (App. 52a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Finding that the district court's judgment in favor of the Unions was "not directly challenged upon appeal" (App. 18a), the Court of Appeals affirmed that judgment without adjudicating its merits. The court reversed the district court's judgment in favor of TWA, however, on finding that TWA had not carried its burden of showing that it had satisfied its legal obligation to make "reasonable accommodation" to respondent Hardison's Sabbatarian religious practice (App. 9a-16a). The court's rationale necessarily and explicitly assumes that petitioner Unions are legally obligated to waive or vary provisions of their collective bargaining agreement in order to accommodate respondent Hardison's beliefs, if called upon by TWA to do so. The court held that TWA was not called upon

to do so because, erroneously in our view, it found other means of accommodation available. In our view, the question posed on this petition therefore is:

Whether the statutory prohibition against discrimination on account of religion, imposed on employers and unions by Sections 701(j) and 703 of Title VII of the Civil Rights Act of 1964, as amended, requires the parties to a collective bargaining agreement to prejudice the beneficiaries of non-discriminatory seniority and other rights guaranteed by that agreement by according privileges to Sabbatarians which deny those rights to others, where there has never been a practice of discrimination against any employees' religious needs or practices, and where there is no causal or systemic correlation between such needs or practices and the provisions or effects of the seniority and other provisions of the collective bargaining agreement.[1]

STATUTES AND REGULATIONS INVOLVED

Section 701(j) of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e(j), provides:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

---

[1] The Unions' standing to protect its collective bargaining agreement and the interests of its constituents therein against the challenge posed by the judgment against TWA is beyond dispute. *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 232-234 (1938); cf. *Auto Workers* v. *Scofield*, 382 U.S. 205 (1965).

Section 703(a)(1) of the Act, 42 U.S.C. § 2000e-2(a)(1), provides:

> "It shall be an unlawful employment practice for an employer . . . to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . religion . . . ."

Section 703(c) of the Act, 42 U.S.C. § 2000e-2(c), provides:

> "It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from membership, or otherwise to discriminate against, any individual because of his . . . religion . . . ;
>
> (2) to limit, segregate, or classify or fail or refuse to refer for employment any individual, in a way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee . . . , because of such individual's religion . . . ;
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

Section 703(h) of the Act, 42 U.S.C. § 2000e-2(h), provides:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin . . . ."

The Guidelines of the Equal Employment Opportunity Commission with respect to religious discrimination, 29 C.F.R. § 1605.1, provide in pertinent part as follows:

* * *

> "(b) The Commission believes that . . . section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees . . . where such accommodation can be made without undue hardship on the conduct of the employer's business.
>
> (c) . . . [T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable."

STATEMENT OF THE CASE

1. Introductory Statement

This petition is a companion to that filed on February 9, 1976, by Trans World Airlines, Inc., in No. 75-1126. Both petitions present an issue related to that in *Parker Seal Co.* v. *Paul Cummins,* No. 75-478, *certiorari granted,* — U.S. —, 44 L.W. 3493, March 1, 1976. Like *Parker Seal,* these cases involve the scope and effect of the EEOC guideline dealing with religious discrimination, now codified at 42 U.S.C. § 2000e (j). Unlike *Parker Seal,* these cases pose that question in the context of collectively bargained rights and privileges and implicate the interests of exclusive bargaining agents in protecting the interests of their constituents against discrimination which favors religious practice over non-religious practice and motivation in the competition for Saturdays off.

2. Background and Basic Facts

Respondent Larry G. Hardison was employed by respondent TWA at its maintenance base at Kansas City International Airport from June 5, 1967, until his termination on April 2, 1969. During all of that time, Hardison was in a bargaining unit represented by the IAM&AW petitioners (App. 2a). The terms and conditions of his employment were governed by a collective bargaining agreement negotiated between them and TWA.[2]

TWA operates its Kansas City International maintenance base on a round-the-clock, seven days-a-week basis because of the needs of the service (App. 2a). When Hardison applied for and accepted employment with TWA he indicated that he was willing to work evenings, nights, and weekends.

In early 1968, Hardison became interested in the Worldwide Church of God, and by the fall of that year he considered himself bound by its tenets (App. 2a-3a). One of the religious principles to which Hardison determined to adhere was the prohibition of servile work on the Sabbath—from sundown every Friday to sundown Saturday—and on certain holidays observed periodically throughout the year (App. 2a). Hardison was able initially to accommodate the requirements of his job to the requirements of his faith by being assigned to a third shift, Sunday to Friday schedule, under which his work week ended on Friday morning (App. 45a).

Hardison lost that flexibility, however, when he exercised the right, accruing to his seniority, successfully

---

[2] That entire agreement is in the record in the district court. Pertinent excerpts are reproduced as Appendix D to this petition.

to bid for a day shift assignment. That assignment, in his view, was more desirable than his previous night shift assignment because of his recent marriage. The new assignment entailed transfer from Building 1 to Building 2, and placement in a different seniority area, where his competitive seniority standing was considerably lower than in Building 1 (App. 3a-4a, 45a).

In March, 1969, the employee junior to Hardison on the Building 2 seniority list went on vacation, and Hardison, as the next most junior person on the seniority roster, was scheduled, in accordance with the applicable provisions of the collective bargaining agreement, to take his place. The vacationing employee was on a schedule requiring week-end work (with days off scheduled in mid-week), and Hardison was consequently scheduled to work on Saturdays (App. 4a). After unsuccessful attempts by TWA and Union officials to devise a solution to Hardison's conflict, he was scheduled for, and declined to work, three successive Saturdays (March 8, 15, and 22, 1969) (App. 4a, 35a-36a). As a result of those three unexcused absences, and after a hearing before a TWA representative at which he was represented by the Union, Hardison was discharged by TWA, effective April 2, 1969 (App. 5a, 36a-37a). This lawsuit followed.

3. Proceedings Below

Hardison, having first invoked the administrative remedy provided by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, brought this action in the district court on February 10, 1972, asserting jurisdiction under Section 706 of Title VII, 42 U.S.C. § 2000e-5. He charged both TWA and petitioner Unions with violating rights granted him by Title VII,

alleging in substance that his discharge by TWA constituted discrimination on account of his religion, and charging in his complaint that the Unions "cooperated, acted in concert, and assisted" TWA in that action, all in violation of Title VII of the Civil Rights Act of 1964.[3]

After a trial in which much of the factual record was stipulated, the district court ruled that Sections 703(a) and (c) of Title VII, 42 U.S.C. § 2000e-2(a) and (c), and valid Regulations of the Equal Employment Opportunity Commission interpreting the statute required both employer and unions to make "reasonable accommodations to the religious needs of employees . . . where such accommodations can be made without undue hardship . . . " 29 C.F.R. § 1605.1 The court further ruled, however, that, on the facts of this case, both the Unions and TWA had satisfied the legal obligations owed Hardison, and ordered entry of judgment for all defendants. The district court thus rejected Hardison's claim that the Unions had "discriminated against him because of [their] failure to refuse to comply with the seniority provisions of the collective bargaining agreement . . . which governed [Hardison's] employment" (App. 28a-29a). Title VII does not, in the district court's view, require the Unions "to ignore seniority in every case in which an employee with lesser

---

[3] Prior to March 24, 1972, Title VII did not define the term "religion" as used in Section 703. The Equal Employment Opportunity Commission had, in 1967, issued a Guideline purporting to define the statutory prohibition on religious discrimination. That Guideline, appearing at 29 C.F.R. § 1605.1 (p. 5, *supra*), was found by both the district court and the court of appeals to be applicable in this case. The Equal Employment Opportunity Act of 1972 added what is now Section 701(j), 42 U.S.C. § 2000e(j) to Title VII, substantially incorporating the language of 29 C.F.R. § 1605.1 into the Act's definition of religion.

seniority can observe his Sabbath only by changing shifts with a more senior employee . . . ." (App. 30a).

With respect to TWA, the court held that "[t]he duty imposed on an employer by Title VII [as implemented by the EEOC Guidelines] is not a duty to impose hardships on the rest of his employees or members to accommodate the religious beliefs of a few" (App. 47a), and directed entry of judgment for TWA.

The court of appeals reversed the judgment for TWA. While it affirmed the judgment in favor of the Unions, it did so expressly on the ground that the posture of respondent's argument on appeal and the court's disposition of the case against the employer made it unnecessary to review the district court's ruling regarding the Unions (App. 18a).

Recognizing the district court's holding "that the valid seniority provisions of the unions' collective bargaining agreement with TWA did not permit further accommodation by any of the defendants" (App. 5a), the court of appeals nevertheless identified two separate courses of accommodation which it found (in our view erroneously, pp. 11-12, *infra*), were available "within the framework of the collective bargaining agreement", but not pursued by TWA (App. 11a). Those courses were, first, to assign "a supervisor . . . or another worker on duty elsewhere" to replace Hardison on his Saturday shift, permitting him to work a four-day week (App. 11a). Second, TWA might have "h[e]ld[ ] a worker over from the last shift, call[ed] a worker in early, or, more logically, assign[ed] a worker from the pool of 200 employees qualified to do the work" (App. 12a).

The court suggested that a "third alternative" (App. 14a), was also available and therefore required, if necessary, to accommodate Hardison. This alternative —arranging and permitting a "swap" between Hardison and another employee—as the court recognized, would have raised a potential conflict with the collectively bargained seniority system (App. 14a). Fully recognizing this conflict, the court declared that "[i]t would seem that a collective bargaining agreement, the seniority provisions of which preclude *any* reasonable accommodation for religious observances by employees, is prima facie evidence of union and employer culpability under the Act" (App. 15a).

REASONS FOR GRANTING THE WRIT

The approach of the court below requires employers, in the name of "reasonable accommodation" to Sabbatarians, to ignore or abridge collectively bargained non-discriminatory rights and privileges of all employees even though there is no claim and no showing that those contractual rights and privileges operate to disadvantage Sabbatarians as a class, or intentionally or otherwise perpetuate effects of any previous discrimination against them. The court thus extends Title VII far beyond its intended prophylactic and remedial objectives, *Albemarle Paper Company, et al.* v. *Moody, et al.*, 422 U.S. 405, 417-418 (1975), and, in effect, requires discrimination in favor of Sabbatarians in the competition for Saturdays off, even though Sabbatarians individually, and as a class, have not been subjects of past discrimination and reverse discrimination is not necessary or appropriate as a remedial measure.

In our view, this interpretation of Title VII departs fundamentally from its intended objectives as this

Court and most courts of appeals have interpreted them, and unnecessarily creates an unhealthy and divisive conflict in the Nation's work force. Saturday off is a cherished goal of millions of employees motivated by secular rather than religious considerations. As between them and Sabbatarians, in organized industry the neutral principle of seniority has heretofore been the mediating rule. We believe Congress approved and intended to preserve that condition. Whether the law instead requires employers to abrogate seniority and other contract rights to accommodate Sabbatarians is a question which affects hundreds of thousands of collective bargaining agreements and the interests of millions of employees and their statutory representatives. Its importance is self-evident, as both courts below recognized, and, in the public interest, it should be settled by this Court at the earliest feasible time.

1. The decision below necessarily obligates TWA to abridge collectively bargained rights and privileges of non-Sabbatarians in order to "accommodate" Hardison. Since the court recognized that both TWA and the Unions would have acquiesced in "a voluntary swap" of assignments if one could be arranged, and, indeed, that an IAM&AW steward had at one time attempted unsucessfully to arrange such a "swap" App. 14a), the requirement that TWA do even more to "accommodate" Hardison can mean only that TWA was required either (1) to leave Hardison's job unfilled on his scheduled Satudays, or (2) to compel an unwilling employee to fill it. But the district court found that the nature of Hardison's job made the first of these options unacceptable (App. 40a), and the court below does not appear to have questioned that finding (App. 11a). Thus all the alternatives which

the court of appeals described as being available "within the framework of the collective bargaining agreement" (App. 11a) would in fact, have required TWA to violate the collectively bargained rights of other employees (1) to bid for shift assignments and days off on the basis of seniority (App. 57a), (2) to refuse overtime work unless required by an "emergency" (App. 59a), or (3) to preserve bargaining unit work for bargaining unit employees (App. 54a- 56a).

Thus, the court below erred in assuming that an "accommodation" could be made for Hardison's Sabbatarianism without violating rights of other employees under the collective agreement. Consequently, the question which the court below purported to reserve (App. 18a) is ripe for adjudication now.

2. Throughout the development of Title VII law, courts have been required to resolve difficult questions concerning the intended relationship of Title VII rights to collectively bargained seniority rights.[4] Before the opinion of the court below, courts of appeals had unanimously concluded, applying principles adopted by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), that collectively bargained seniority systems which were neutral on their face and neutral in intent, were subject to judicial revision only where they operated necessarily "to cut into the [protected] employee's present right not to be discriminated against on account of [a prohibited classification]." *Watkins, et al.* v. *United Steel Workers of America,*

---

[4] See, *e.g.*, *Quarles* v. *Philip Morris*, 279 F.Supp. 505 (E.D. Va., 1968); *Local 189, UPP* v. *United States*, 416 F.2d 980 (5th Cir., 1969), *cert. denied*, 397 U.S. 919 (1970); *United States* v. *Jacksonville Terminal Co., et al.*, 451 F.2d 418 (5th Cir., 1971), *cert. denied*, 406 U.S. 906 (1972).

Local 2369, et al., 516 F.2d 41, 46 (5th Cir., 1975). The *Watkins* court found in Section 703(h), 42 U.S.C. 2000e-2(h), "an express intent to preserve contractual rights of seniority as between whites and persons who had not suffered any effects of [racial] discrimination." *Watkins, supra*, at 48.[5] That proposition surely applies *a fortiori* to the area of religious discrimination. It is, in fact, compelled by this Court's recognition that Title VII "does not command that any person be hired [or otherwise preferred] simply because . . . he is a member of a minority group. *Discriminatory preference for any group,* minority or majority, is *precisely and only* what Congress has proscribed." *Griggs, supra,* at 430-431 (emphasis added).

To be sure, this Court has recognized that, where necessary to make victims of unlawful discrimination whole, courts are empowered, notwithstanding Section 703(h), to require that such victims be granted seniority credit which, but for the unlawful discrimination against them, they would have earned. *Franks, et al.* v. *Bowman Transportation Compny,* — U.S. —, 44 L.W. 4356, (March 24, 1976). But the "accommodation which the court below would require of TWA (and of unions and their constituents) does not even pertain to any remedy necessary to make Hardison whole for losses caused him by unlawful discrimination. Unless Hardison is entitled by Section 701(j), because of his religious convictions, to a preference superseding neutral rights contractually established for all employees, a preference which ipso facto defeats the competing rights of his fellow employees, there is

---

[5] Accord: *Jersey Central Power and Light Company* v. *Local 327, IBEW*, 508 F.2d 687 (3rd Cir., 1975) (Petitions for cert. filed, 44 L.W. 3111 (No. 75-182, August 1, 1975), and 44 L.W. 3253 (No. 75-465, September 24, 1975)); *Waters, et al* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir., 1974).

no discrimination against him to be remedied. To construe Title VII as creating for Hardison and others similarly situated a preference superseding the terms of the collective agreement is to establish the very kind of "[d]iscriminatory preference" at the expense of coworkers which this Court has held proscribed rather than required by Title VII. *Griggs,* quoted *supra* at p. 13.

3. There is division among the circuits on the question whether employers and unions must disregard rights and interests of non-religiously motivated employees in order to satisfy the "reasonable accommodation" requirement now embodied in Section 701(j), which should be resolved by this Court. The Fifth [6] and Tenth [7] Circuits, and one panel of the sixth Circuit,[8] have held that requiring an employer to override or ignore interests of non-religiously motivated employees constitutes "undue hardship" which Congress did not intend to impose. Another, conflicting, opinion in the Sixth Circuit,[9] as well as the opinion below, take the opposite view, holding that the interests of non-religiously motivated employees must be sacrificed to

---

[6] *Johnson* v. *United States Postal Service,* 497 F.2d 128 (5th Cir., 1974).

[7] *Williams* v. *Southern Union Gas Company,* — F.2d —, 11 [CCH] EPD ¶ 10.621 (10th Cir., January 21, 1976) ("On the one hand [the employer] had a duty to at least try to accommodate Williams' religious practices. On the other hand it also had a duty . . . to adhere to employment practices that were fair to its other employees." 11 [CCH] EPD ¶ 10.621, at p. 6592).

[8] *Reid* v. *Memphis Publishing Company,* 521 F.2d 512 (6th Cir., 1975).

[9] *Cummins* v. *Parker Seal Company,* 516 F.2d 544 (6th Cir., 1975), *cert. granted,* — U.S. —, 44 L.W. 3493 (March 1, 1976).

achieve the "reasonable accommodation" mandated by Section 701(j). Early resolution of this conflict will serve the national interest, as the grant of certiorari in *Cummins* v. *Parker Seal,* p. 5, *supra,* attests. Moreover, this case, unlike *Parker Seal Co.,* presents squarely the conflict in substance between the obligation as interpreted by the court below to make "reasonable accommodations" to respondent Hardison's Sabbatarian beliefs and the obligation imposed on courts by the policy of our national labor laws, and preserved in Title VII, to resolve competing interests of all unit employees in accordance with neutral, collectively bargained, principles and standards such as seniority. The question in *Parker Seal* and in this case should be weighed and decided in the light of the competing policies which are focused herein.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this petition be granted and that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

PLATO E. PAPPS
Machinists Building
Washington, D. C. 20036

MOZART G. RATNER
DENIS F. GORDON
JAMES R. BARNETT
1900 M Street, N.W.
Washington, D. C. 20036

MICHAEL D. GORDON
1125 Grand Avenue
Kansas City, Missouri 64106
Attorneys for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1424

Larry G. Hardison,
Appellant,

v.

Trans World Airlines, Inc., International Ass'n of Machinists and Aero Space Workers, International Ass'n of Machinists and Aero Space Workers, District 142, and International Ass'n of Machinists and Aero Space Workers, Local 1650,
Appellees.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: December 10, 1974
Filed: December 16, 1975

Before LAY, BRIGHT and WEBSTER, Circuit Judges.

WEBSTER, Circuit Judge.

This appeal presents for our review important questions concerning the requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and the guidelines on religious discrimination promulgated thereunder, 29 C.F.R. §1605 (1974). Larry G. Hardison, a member

of the Worldwide Church of God, initiated this employment discrimination case against his union and his employer following his discharge as a Trans World Airlines (TWA) stores clerk for alleged insubordination. The factual background of this litigation is not disputed, and, in summarizing the relevant details, we rely heavily upon the findings of the District Court,[1] reported in *Hardison v. Trans World Airlines*, 375 F. Supp. 877 (W.D. Mo. 1974).

Hardison's job was covered by a collective bargaining agreement negotiated with TWA by the International Association of Machinists and Aero Space Workers, The International Association of Machinists and Aero Space Workers, District 142, and the International Association of Machinists and Aero Space Workers, Local 1650, all defendants below.[2] That agreement contained seniority provisions relating, *inter alia*, to days off and vacations.

The Stores Department at the Kansas City International Airport, in which Hardison had worked from June 5, 1967 until his discharge on April 2, 1969, operates twenty-four hours per day, seven days per week. Hardison initially worked as a stores clerk in Building No. 1, performing work which was essential to TWA's operation but not unique. In the spring of 1968, Hardison began studying the teachings of the Worldwide Church of God. That religion requires its members to refrain from all work on certain designated holidays as well as on its Sabbath, which occurs each week from sundown on Friday to sundown on Saturday. Hardison discussed his reli-

---

1. The Honorable John W. Oliver, United States District Court for the Western District of Missouri.

2. While distinctions between the local, district, and international unions are made by appellees in this appeal, our holding makes it unnecessary to take account of such distinctions, and the unions are sometimes for convenience collectively referred to herein as "the union".

gious studies with Everett Kussman, the Manager of the Stores System, who notified a TWA supervisor by memo as follows:

1. Agreed to Steward seeking swap of days off

2. Agreed to odd holidays (excused T.O.) if he works the 'Christian' holidays when requested.

3. He advises you are getting him another job—agreed *you should.* Belongs to the 'World Wide Christian Church' Garner Ted Armstrong Ambassador College Pasadena Calif

Soon thereafter, the supervisor notified Kussman that he had been unable to make any "headway" in trying to resolve the problem. Hardison continued to work on Friday evenings and Saturdays, including some voluntary over-time work. On October 4, 1968, Hardison wrote Kussman that he had transferred to the 11:00 p.m. to 7:00 a.m. shift as a result of which he would be able to observe the Sabbath and would soon formally enter the Worldwide Church of God. He reminded Kussman of his assurance that Hardison would be excused from work on certain holidays under those circumstances. Subsequently, he furnished Kussman at his request a list of religious holidays and dates thereof.

On December 2, 1968, Hardison bid for a position as a stores clerk in another section in Building 2 in order to obtain a day shift position. Hardison indicated that his reason for transferring to the Building No. 2 section was his recent marriage: he felt day work would be more compatible with married life. Each of these stores clerk sections was governed by a separate seniority list. Thus, although Hardison had relatively high seniority in Building No. 1, he had the second lowest seniority position in

Building No. 2. As a result, his ability to select days off was considerably diminished.

In March, 1969, Bill Wyatt, the man on the bottom of the seniority list in the Building No. 2 section, went on vacation. Hardison was called to substitute for Wyatt, whose work schedule included Friday evenings and Saturdays. On March 6, 1969, Hardison met with Kussman and James Tinder, a union steward, to discuss the conflict between this schedule and Hardison's religious practices. Several possible adjustments were explored,[3] but since all required Hardison to do some work on the first Saturday, March 8, none of these adjustments were instituted. Hardison did not file a grievance concerning this unsatisfactory resolution although he knew he had a right to do so.

Hardison did not report for work on Saturday, March 8, informing the storekeeper that he had personal business to do. Hardison was likewise absent from work on the following two Saturdays, March 15 and March 22. He was then notified that a discharge hearing had been scheduled. Prior to that hearing, Hardison met with Local 1650's grievance committee. Various avenues of legal redress and defenses were discussed, and it was decided that the best approach would be a plea for leniency coupled with an effort to obtain reversal at a higher lever in the event of an adverse result. The possibility that the union might waive its seniority rules to permit Hardison to work on a different shift was not discussed. Following the meeting, Hardison voluntarily changed his shift to the "twilight shift" (3:00 p.m. to 11:00 p.m.) in an effort to resolve the problem. When Hardison left work early (at sundown) on Friday, March 28, however, it became ap-

---

3. These included such possibilities as changing Hardison's shift, changing his job, or permitting him to work four days per week rather than five.

parent that this change in schedule would not obviate future problems as Local 1650 had hoped.

The discharge hearing was held on March 31, 1969, before TWA representative J. H. Frey. Although Local 1650 argued that termination was too severe a penalty, Hardison was found guilty of insubordination and discharged on April 2, 1969. Thereafter, both Local 1650 and District 142 attempted to contact Hardison about pursuing the matter further, but upon receiving no cooperation from Hardison, they dropped the case.

Hardison filed an unlawful employment practice charge with the Equal Employment Opportunity Commission which deferred to the Missouri Commission on Human Rights. On February 10, 1972, after all administrative procedures had been exhausted, Hardison filed suit against TWA and the three unions in United States District Court pursuant to 42 U.S.C. §2000e-2.[4] He contended that all the defendants had practiced religious discrimination and, in addition, that the unions had violated their duty of fair representation. Following a trial to the court on primarily stipulated facts, judgment was entered for all defendants on the ground that each had attempted a reasonable accommodation of plaintiff's religious needs, as required by the controlling statutes and guidelines, and that undue hardships would have resulted from any greater efforts. *Hardison* v. *Trans World Airlines, supra.*

In essence, the decision below held that the valid seniority provisions of the unions' collective bargaining agreement with TWA did not permit further accommodation by any of the defendants. Hardison appeals, contending that the District Court's findings of reasonable accommodation and potential undue hardship were clearly

---

4. Federal jurisdiction was established below under 42 U.S.C. §2000e-5 and is not challenged on appeal.

erroneous. Separate briefs have been filed by Hardison, the unions, TWA, and by two amici curiae seeking reversal, the Equal Employment Opportunity Commission and COLPA (National Jewish Commission on Law and Public Affairs).

The issues before us include the alleged unconstitutionality of Title VII and the guidelines on religious discrimination, the extent of the unions' duty of fair representation under the circumstances presented, and whether the findings below that the defendants had fulfilled their respective duties to attempt a reasonable accommodation, short of undue hardship, of Hardison's religious practices were clearly erroneous.

I

STATUTORY AND REGULATORY FRAMEWORK

Our review must necessarily begin with an examination of the controlling statutes and regulations.

The Civil Rights Act of 1964 specifically forbids employers from practicing religious discrimination in specifically enumerated ways.

42 U.S.C. §2000e-2(a) provides in part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
> * * *

42 U.S.C. §2000e-2(c) provides:

> It shall be unlawful employment practice for a labor organization—
>
> (1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

The EEOC is empowered to promulgate regulations in aid of the statute. 42 U.S.C. §2000e-12(a). The original guidelines provided:

> However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday.

29 C.F.R. §1605.1(a)(3), 31 Fed. Reg. 8370 (1966). The regulations were modified in 1967 to provide:

> The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

29 C.F.R. §1605.1(b), 32 Fed. Reg. 10298 (1967). The EEOC further placed upon the employer "the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 C.F.R. §1605.1(c), 32 Fed. Reg. 10298 (1967).

The possibility that the revised regulations might impose a burden (to accommodate) not contemplated by the statute which posed "grave constitutional questions" of violation of the Establishment Clause of the First Amendment was raised in dicta in *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 334 (6th Cir. 1970), affirmed by an equally divided Court, 402 U.S. 689 (1971). *Dewey* also concluded that Title VII only prohibited acts taken with intent to discriminate. This conclusion was rejected by the Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

In 1972, Congress incorporated the substance of 29 C.F.R. §1605.1(b) into the Act by defining "religion" as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. §2000e(j).

This amendment has been held to have eliminated all doubt that the guideline at 29 C.F.R. §1605.1 reflects the will of Congress. *Reid* v. *Memphis Publishing Co.*, 468 F.2d 346, 351 (6th Cir. 1972);[5] *Riley* v. *Bendix Corp.*, 464 F.2d 1113, 1116-17 (5th Cir. 1972). The District Court likewise so held, and we agree.

TWA LIABILITY

29 C.F.R. §1605.1, which we hold to be consistent with the statute, defines the parameters of the employer's duty. The company may not accept the role of a Pontius Pilate.[6] An effort to accommodate the employee's religious observances must be made. Such accommodation need only be a reasonable one. An accommodation alternative which imposes undue hardship upon the employer's business is unreasonable and not required. The burden of demonstrating its inability to reasonably accommodate falls upon the employer.

The record reflects a consistent effort by Hardison to acquaint TWA with his religious conversion and the effect of that commitment upon his ability to work during his

---

5. In a second appeal, a different panel of the Sixth Circuit (Edwards, J., dissenting) seems to have receded from its prior holding that the regulation was consistent with the statute. *Reid* v. *Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975). We are more persuaded by the earlier opinion and by Judge Edwards' dissent.

6. Matthew 27:24.

Sabbath period and certain other religious holidays. He made no demands which were not consistent with his known religious beliefs. He was willing to work long weeks or short weeks provided his religious obligation to abstain from work on his Sabbath could be met. He even transferred to the twilight shift in order to minimize the impact of his absence on the company.

We cannot agree with the company's contention, apparently accepted by the District Court, 375 F. Supp. at 891, that Hardison's transfer from Building No. 1 to Building No. 2 was evidence of a lack of cooperation on his part. The implication is that if Hardison had not transferred he would have retained enough seniority in Building No. 1 to protect himself against Sabbath day assignments. This is not accommodation. To limit Hardison's right of transfer within the company as a condition of accommodation would be "to discriminate against [him] with respect to his * * * conditions, or privileges of employment, because of [his] * * * religion * * *." 42 U.S.C. §2000e-2(a)(1). The purpose of this transfer was to obtain a daytime shift, Hardison having recently married. While the regulation implies that the employee must be responsive to a reasonable accommodation, no such accommodation was ever offered by TWA, which at all times contended that it was precluded from accommodating Hardison's Sabbath observance by the collective bargaining agreement. Before an employer can assert the defense of non-cooperation, it is incumbent upon it to establish the accommodation which it has tendered and with which the employee refused to cooperate. *See Riley* v. *Bendix Corp., supra; Claybaugh* v. *Pacific Northwest Bell Telephone Co.*, 355 F. Supp. 1, 4-6 (D. Ore. 1973) (Employer should have attempted a temporary accommodation in view of its large work force).

Hardison's job assignment in Building No. 2 was to pick up or deliver parts needed by mechanics working in the building. He was to "run the train", that is, to continually make the rounds of the shops in the building. He was part of a work force of 38 to 40 people, although he would be the only person running the train during his particular shift on the weekend. TWA conceded that there were over 200 available employees who were capable of performing Hardison's work.

The District Court concluded that TWA had made a reasonable effort to accommodate Hardison's religious beliefs and that the alternatives rejected by TWA would have created an undue burden on TWA's business. Upon a full review of the record, we must respectfully disagree with both conclusions.

Alternatives Rejected

(1) Within the framework of the collective bargaining agreement, TWA could have permitted Hardison to work a four-day week. Hardison was willing to do this,[7] but the company would not agree because it would be shorthanded during one shift. It conceded that a supervisor could be utilized or another worker on duty elsewhere could be transfered, but urged that this would cause some other shop function to suffer. Similar arguments have been rejected by the Equal Employment Opportunity Commission. E.E.O.C. Decision No. 70-580 (March 2, 1970), 2 FEP Cases 516, 1973 CCH EEOC Decisions ¶6120; E.E.O.C. Decision No. 70-110 (Aug. 27, 1969), 2 FEP Cases 225, 1973 CCH EEOC Decisions ¶6062.

In determining whether a possible accommodation would result in undue hardship or mere inconvenience, we

---

7. Hardison was also willing to work a six-day week but this solution was in apparent violation of the 40 hour per week clause of the contract.

must look to the facts of each case. The burden of demonstrating undue hardship is upon the employer. In this case, the company contends that a short week for one man during the temporary period of Wyatt's vacation would have hampered its operations. Two company witnesses expressed such an opinion without any further evidence or factual support. We think the District Court erroneously drew an inference of undue hardship from such testimony. The actual hours involved in this case did not even amount to a full shift, since Hardison had transferred to the twilight shift and would have worked from 3:00 p.m. on Friday until sundown (approximately 6:30 p.m.), thus further reducing the impact upon the company's operations. Balanced against the interests to be protected by §2000e, we cannot say such an accommodation would result in an undue hardship to the employer.[8]

(2) Another alternative within the framework of the collective bargaining agreement was for TWA to fill Hardison's Sabbath shift from other available personnel. This could be accomplished by holding a worker over from the last shift, calling a worker in early, or, more logically, assigning a worker from the pool of 200 employees qualified to do the work. TWA contended that this alternative

---

8. Cases cited by TWA are readily distinguishable. They deal with situations where the work force available to accommodate the complaining employee's needs was small, *see, e.g., Johnson* v. *United States Postal Service*, 364 F. Supp. 37 (N.D. Fla. 1973), *aff'd*, 497 F.2d 128 (5th Cir. 1974); *Drum* v. *Ware*, ... F. Supp. ....., 7 FEP Cases 269, 7 EPD ¶9244 (W.D. N.C. 1974); or where the employer presented no evidence to support its claim that it reasonably accommodated its employee's needs, *see, e.g., Riley* v. *Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972), or that it would suffer undue hardship, *see, e.g., Jackson* v. *Veri Fresh Poultry, Inc.*, 304 F. Supp. 1276 (E.D. La. 1969). Moreover, we think a totality of the circumstances approach must reject unproven assumptions that the company will be inundated with similar demands. That approach would be more persuasive at a point in time when the hardship was in fact evident and was manifestly undue. Hardison's request was the first of its kind which TWA's witnesses could recall.

would be an undue hardship because such workers must be paid overtime compensation. The District Court said, "The duty to accommodate does not require that an employer make every effort short of going out of business to permit his employees to s[t]ay on the job and also to observe their religion", 375 F. Supp. at 889, and that "Title VII cannot be interpreted to require that companies finance employee's religious beliefs." 375 F. Supp. at 891. These general statements, while arguably correct, may tend to distort the actual hardship which overtime payments would have imposed upon TWA to fill Hardison's Sabbath shift under the facts of this case. The regulation does not preclude some cost to the employer anymore than it precludes some degree of inconvenience to effect a reasonable accommodation. *Cf. Ward* v. *Allegheny Ludlum Steel Corp.*, 397 F. Supp. 375, 377 (W.D. Pa. 1975). The regulation expressly casts upon the employer the burden of proving undue hardship upon its business. Each case must stand upon its own facts. The actual cost of accommodation by filling Hardison's Sabbath shift from available personnel is not clear from the record. We do know that in this case the cost would have ended upon Wyatt's return from his vacation.[9] The company might well have concluded that the additional expense was preferable to getting along with one less man on the shift or suffering the administrative inconvenience of seeking a swap for Hardison. It does not appear from the record, however, that TWA gave any serious consideration to the reasonableness of such an alternative or to the extent of the burden it might create upon the business of TWA. We cannot say that its burden of proof has been met in this case.

---

9. It should also be obvious that neither Hardison nor his religion would have benefited financially from such an accommodation.

(3) A third alternative considered was a swap between Hardison and another employee, either for another shift or for the Sabbath days.[10] While both TWA and the union indicated no opposition to a voluntary swap, the acquiescence was clearly couched in terms of the limitations imposed by Article VI, the seniority clause of the collective bargaining agreement:

> (b) The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.

The company relied upon the union steward to handle the details. Every swap was technically at risk because the exchange was subject to the right of a senior worker to bump into the opening. Thus, the company and the union contended that they could not individually or jointly act to make a job exchange which would accommodate Hardison's religious need to be free of servile work on his Sabbath.

The proper relationship between a bona fide seniority system and the requirement of reasonable accommodation under 29 C.F.R. §1605.1 has not yet been settled by the

---

10. TWA had earlier agreed to a "swap" on Hardison's religious holidays provided Hardison was willing to work an equal number of "Christian" holidays and another employee was willing to trade with Hardison. None of the holidays (as distinguished from Sabbath days) had fallen on Hardison's shift prior to his discharge, and we are not concerned with whether TWA's posture with respect to such religious holidays was a reasonable accommodation. We note, however, that the undertaking was to permit a swap, not to find one or obtain union approval.

Supreme Court.[11] The Equal Employment Opportunity Commission has taken the position that when the inflexibility of a collective bargaining agreement is raised as a defense to charges of religious discrimination, that inflexibility must be justified by substantial business necessity. E.E.O.C. Decision No. 73-0314 (Aug. 31, 1972), 1973 CCH EEOC Decisions ¶6379; E.E.O.C. Decision No. 72-2066 (June 22 1972), 4 FEP Cases 1063, 1973 CCH EEOC Decisions ¶6367. At least one court has directed that an article in a collective bargaining agreement which would have required an employee to work occasional Saturdays in violation of his religious beliefs not be applied to such employee. *Drum* v. *Ware*, ... F. Supp. ....., 7 FEP Cases 269, 7 EPD ¶9244 (W.D. N.C. 1974). *But see Dawson* v. *Mizell*, 325 F. Supp. 511 (E.D. Va. 1971). It would seem that a collective bargaining agreement, the seniority provisions of which preclude *any* reasonable accommodation for religious observances by employees, is prima facie evidence of union and employer culpability under the Act.[12] We are not required to reach that point in this case, however, because the evidence is clear that

---

11. 42 U.S.C. §2000e-2(h) provides in part:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. * * *

12. If Saturday work inevitably falls to the employees with lowest seniority, one may well ask whether such seniority provisions would not effectively preclude TWA from ever hiring those Seventh Day Adventists, Orthodox Jews, and members of the Worldwide Church of God whose religious convictions preclude work from sundown on Friday until sundown on Saturday. It is no answer to such a person, or to the statute itself, that if he compromises his religious beliefs for a time he may develop enough seniority to practice them again.

TWA did not seek and the union therefore did not refuse to entertain a possible variance.[13]

TWA did not even seek to find volunteers within the seniority system. It left that task to the union steward, who likewise did nothing. The matter was not referred to the Union Relief Committee, an informal organization of union members through which the union and TWA were normally able to avoid confrontations over seniority variances in special situations. This was the first Sabbath request which TWA and the union had received at the Kansas City operation. While company officials testified of their concern that giving Hardison a variance would irritate other union members, we find no evidence to support such an inference, nor are we convinced that such irritation, if real, would have been an undue hardship on the employer's business. *See Cummins* v. *Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975). *See generally*, Annot., 22 A.L.R. Fed. 580 (1975).

III

UNION LIABILITY

The District Court rejected the union's contention that the duty of accommodation falls only upon the employer and not upon the union. Judge Oliver observed:

> The language of the regulation does speak in terms of the employer but so have other provisions and

---

13. In *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937 (M.D. Ala. 1974), a collective bargaining agreement which contained a seniority provision also contained a provision that "seniority cannot be the sole determining factor in making shift assignments." The court held that failure of the employer to seek a variance to permit the employee, a Seventh Day Adventist, to transfer to a position which would avoid his working on his Sabbath was a violation of Title VII. *But see Kettell* v. *Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972), decided prior to the 1972 Amendment to Title VII which makes clear that failure to make affirmative accommodation must be justified by the employer.

> regulations pursuant to the Act, which have been interpreted to include the union. For example, 42 U.S.C. §2000e-2(h), the provision on seniority systems discussed below has been applied to unions. See, e.g., Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).
>
> Furthermore, this case is a perfect example of a situation in which a union could accommodate a member if required to do so. TWA agreed that plaintiff could change shifts if the union approved. Such approval would mean that the union would have to suspend the operation of the seniority rules in plaintiff's case. Had the union made this accommodation, plaintiff would have been able to observe his Sabbath as he wished.

375 F. Supp. at 882. We agreed with Judge Oliver's analysis and conclusion that in a proper case a union may be held to a duty of reasonable accommodation as well as the employer. This conclusion is consistent with the provisions of 42 U.S.C. §2000e-2(c), which declare it to be an unlawful employment practice for a union "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." Thus, the union may be held liable if it purposefully acts or refuses to act in a manner which prevents or obstructs a reasonable accommodation by the employer so as to cause the employer to discriminate.

The District Court next considered the union's duty in light of its existing contract. Finding the seniority provisions of the contract to be facially neutral, the District Court held it to be "coincidental" that as to Hardison "the seniority system acted to compound his problems in exercising his religion." 375 F. Supp. at 883. The Dis-

trict Court further found that the union's duty to accommodate in this case "did not require the union to ignore its seniority system" and that the efforts of the union in behalf of Hardison did not violate its duty of fair representation. 375 F. Supp. at 883-85.

These conclusions are not directly challenged upon appeal, and the briefs and oral argument are directed to the breach of duty by TWA. We are thus not required to reach the substantive correctness of such conclusions. *Twin City Federal Savings & Loan Association* v. *Transamerica Insurance Co.*, 491 F.2d 1122, 1127 (8th Cir. 1974); *Mississippi River Corp.* v. *Federal Trade Commission*, 454 F.2d 1083, 1093 (8th Cir. 1972). We reserve for future cases the effect of a union's refusal to modify its employee seniority rights when no other accommodation can be accomplished without undue hardship to the employer's business. *See Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006 (1971).[14] At this point, no hard rules seem possible; the balancing of important competing interests must be done on a case by case basis.

---

14. In *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006 (1971), the Fourth Circuit held:

> Avoidance of union pressure also fails to constitute a legitimate business purpose which can override the adverse racial impact of an otherwise unlawful employment practice. The rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert. Title VII requires that both union and employer represent and protect the best interests of minority employees. Despite the fact that a strike over a contract provision may impose economic costs, if a discriminatory contract provision is acceeded to the bargainee as well as the bargainor will be held liable. [footnote omitted]

IV

CONSTITUTIONAL CLAIM

Since we conclude that TWA violated its duty of accommodation, we must reach its constitutional claim that Ttile VII violates the Establishment Clause of the First Amendment by requiring an accommodation. TWA contends that the statute not neutral as between groups of religious believers and nonbelievers. *See School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963); *Everson* v. *Board of Education*, 330 U.S. 1 (1947). The view that it is constitutionally impermissible for a government to enforce accommodation of religious beliefs in a manner which results in privileges not available to a nonbeliever, or which result in inconvenience to the nonbeliever, is not without articulate support. *See* Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971). *But see* Comment, *Religious Observance and Discrimination in Employment*, 22 Syracuse L. Rev. 1019 (1971).

The District Court, however, found this constitutional attack upon the statute and guidelines to be without merit. It first applied the three-fold test set forth in *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 772-73 (1973): (1) the law must reflect a clearly secular purpose; (2) it must have a primary effect that neither advances nor inhibits religion; and (3) it must avoid excessive government entanglement with religion. The District Court stated:

> The duty to accommodate, as stated in 42 U.S.C. ¶2000e(j), reflects the general secular legislative purpose of guaranteeing an employee that he will not be discharged from his job merely because of his religion. Consistent therewith, the regulation also im-

poses a duty to accommodate. The incidental effect of the regulation perhaps indirectly aids religion but its primary effect is to guarantee job security. The purpose and effect of the law as interpreted by the regulation is not primarily to aid religion but to prevent employers from devising means to discriminate which are not facially discriminatory but which do discriminate in effect and intent.

Finally, the regulation does not involve excessive government entanglement with religion. The regulation simply requires the employer to make affirmative efforts to accommodate the employee's religion. No further involvement is necessary than a judgment by the E.E.O.C. or the court that no such accommodation was made. That is not the kind of entanglement contemplated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971).

375 F. Supp. at 888.

The same constitutional argument was recently raised in *Cummins* v. *Parker Seal Co., supra,* and similarly rejected. The Sixth Circuit held that both the statute and the regulation met the three-fold test of *Nyquist.* The purpose of the statute, it observed, was "to prevent discrimination in employment." *Id.* at 552. This purpose, it noted, was upheld against constitutional challenge in *Griggs* v. *Duke Power Co., supra,* which dealt with racial discrimination. It found further support in the reasoning of the Supreme Court in *Gillette* v. *United States,* 401 U.S. 437 (1971), wherein draft exemptions for conscientious objectors were upheld, not only upon pragmatic grounds but also because a valid state interest lay in the promotion

of conscientious action thought to be important in a democratic society. The Sixth Circuit noted that neither the statute nor the regulation advanced religion; no financial support was mandated for religious institutions. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). Finally, it noted that the mere requirement of reasonable accommodation involved far less government entanglement with religion than the Sunday closing laws sanctioned by *McGowan v. Maryland*, 366 U.S. 420 (1961). We find this reasoning persuasive, and we agree with the District Court's conclusion that the constitutional challenge must be rejected.

V

CONCLUSION

We affirm the entry of judgment in favor of defendant unions. Since we hold that TWA engaged in religious discrimination by breach of its duty to make a reasonable accommodation to the religious needs of Hardison through affirmative action, we reverse the judgment in favor of TWA and remand the case to the District Court for a determination of appropriate relief under 42 U.S.C. §§2000e-5(g) and 2000e-5(k).

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1424
September Term, 1975

Larry G. Hardison,
Appellant,

vs.

Trans World Airlines, Inc., International Association of Machinist & Aerospace Workers,
International Assoc. of Machinists & Aerospace Workers, Dist. 142, and
International Assoc. of Machinists & Aerospace Workers, Local 1650,
Appellees.

Appeal from the United States District Court for the Western District of Missouri

---

On motion of Appellee, Trans World Airlines, Inc., it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

January 19, 1976

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
St. Louis, Mo. 63101
January 15, 1976

Robert C. Tucker, Clerk

Hon. Michael Rodak, Jr., Clerk
Supreme Court of the United States
Supreme Court Building
Washington, D.C.

Re: No. 74-1424. Larry Hardison v. Trans World Airlines

Dear Sir:

Pursuant to request of Mr. George Feldmiller, Stinson, Mag, Thomson, McEvers & Fizzell, TenMain Center, Kansas City, Missouri we have prepared and are enclosing the two-volume certified transcript of record in the above case for use in the Supreme Court in connection with an application for writ of certiorari. The certified record consists of one volume of Appendix and one volume of the Proceedings in this Court.

Very truly yours,

Robert C. Tucker
Clerk

dw
enc
Copy
Hon. Robert H. Bork
Solicitor General
Mr. William H. Pickett
801 Traders Natl. Bank Bldg.
1125 Grand Avenue
Kansas City, Missouri

APPENDIX B

Larry G. HARDISON, Plaintiff,

v.

TRANS WORLD AIRLINES et al.,
Defendants.

No. 20096-1.

United States District Court,
W. D. Missouri, W. D.
May 15, 1974.

MEMORANDUM AND ORDER

JOHN W. OLIVER, District Judge.

This is an action by an individual plaintiff against his former employer, Trans World Airlines (TWA) and three labor organizations, International Association of Machinists and Aero Space Workers (The International), International Association of Machinists and Aero Space Workers, District 142 (District 142), and International Association of Machinists and Aero Space Workers, Local 1650 (Local 1650) seeking redress from alleged religious discrimination in violation of the Civil Rights Act of 1964. Plaintiff asserts that his discharge from employment because of his refusal to work from sundown Friday to sundown Saturday pursuant to the tenets of his religion was

a violation of his religious liberty, contrary to 42 United States Code, § 2000e-2. Plaintiff is a member of the World-wide Church of God.

The jurisdiction of this Court is based upon 42 United States Code, § 2000e-5(f). Defendant TWA is an employer engaged in interstate commerce and subject to Title VII of the Civil Rights Act of 1964, 42 United States Code, § 2000e et seq. Defendant unions are labor organizations likewise subject to the provisions of Title VII.

I.

Defendants first argue that this Court does not have jurisdiction in this case because of the alleged failure of the plaintiff to comply with the filing deadline of 42 U.S.C. § 2000e-5(d). That argument is answered by the decision of our controlling court in Richard v. McDonnell Douglas Corporation, 469 F.2d 1249 (8th Cir. 1972), which held that the 210-day statute of limitations is tolled upon receipt of the complainant's complaint by the E.E.O.C. Accordingly, in this case plaintiff's complaint of August 29, 1969, tolled the 210-day statute of limitations so that even if we assume that the E.E.O.C. assumed jurisdiction of plaintiff's case on November 18, 1969, the latest arguable date, plaintiff perfected his federal remedy well within the proper time. We find and conclude, therefore, that we do have jurisdiction of this case under the provisions of 42 U.S.C. § 2000e-5(d).

The defendant International challenges this Court's jurisdiction over it on the ground that there was no proper service of process on that organization. The alleged service was made by serving a copy of the complaint on James Tarwater, the financial secretary of Local 1650, who had no official capacity with the International.

We find and conclude that Local 1650 and The International are not autonomous and that, therefore, service upon the local constitutes valid service of process on The International. See Deboles v. Trans World Airlines, Inc., 350 F.Supp 1274 (E.D.Pa.1972) and Claycraft Co. v. United Mine Workers of America, 204 F.2d 600 (6th Cir. 1953).

We further find and conclude that because Local 1650, District 142, and The International are not autonomous, the interests of the latter two organizations were adequately represented before the E.E.O.C. by Local 1650. The argument, therefore, of defendants, District 142 and The International, that they could not be sued in federal court because they were not named in the complaint before the E.E.O.C. is without merit. See Moody v. Albemarle Paper Co., 271 F.Supp. 27 (E.D.N.C.1967).

Defendants argue also that plaintiff failed to exhaust his administrative remedies, first, because he did not pursue administrative remedies set out in the Railway Labor Act (45 U.S.C. § 151 et seq.) and, second, because he did not otherwise pursue contract grievance procedures. The first argument is answered by Norman v. Missouri Pacific Railroad, 414 F.2d 73 (8th Cir. 1969), which reversed the district court's dismissal of a complaint filed pursuant to Title VII of the Civil Rights Act of 1964. The Court of Appeals held that the complaint was cognizable under the Civil Rights Act absent specific prohibitions in the Railway Labor Act and that the Railway Labor Act did not foreclose efforts of employees to secure their statutory rights under the Civil Rights Act. No specific prohibition in the Railway Labor Act has been cited by defendants.

The second argument is answered by the recent decision of the Supreme Court in Alexander v. Gardner-

Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (February 19, 1974), which held that an employee is not foreclosed from suing in federal court under Title VII of the Civil Rights Act of 1964 after arbitration proceedings resulted in an unfavorable ruling. The Court concluded that no election of remedies principles inhered in Title VII. Submission of a claim to one forum does not preclude a later submission to another, Justice Powell declared in the majority opinion. It follows, therefore, that plaintiff can choose to proceed under Title VII without resorting to grievance procedures at all.

II.

The relevant factual circumstances of this case are not substantially disputed. Many of the facts stipulated by the parties in Standard Pretrial Order No. 2 are simply not relevant. Other findings suggested by the parties in which there is dispute are for the most part irrelevant. The facts as we have found them include only those relevant to the resolution of the legal questions presented and for the most part are those which admit of very little dispute. The following discussion will serve as our findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules of Civil Procedure.

A. *Union Responsibility*

Plaintiff names the three union defendants in his complaint and asks for an injunction against the unions to prevent them from failing to adequately represent the plaintiff and from depriving plaintiff of his right to freely exercise his religious beliefs without discrimination by the union. In his suggested conclusions of law, plaintiff states merely that defendant unions "discriminated against plaintiff by reason of his religion in violation of the Civil Rights

Act of 1964 by enforcing a collective bargaining agreement which was discriminatory against plaintiff in its application." Plaintiff cites a number of cases in support of this proposition without discussion. We have studied all of those cases. Most are entirely irrelevant to the issue of whether the union should be held responsible for the violation, if any, of the Civil Rights Act of 1964. Others are relevant only by broad application of the principles stated therein.

Labor union compliance with the Civil Rights Act of 1964 is dictated by 42 U.S.C. § 2000e-2(c):

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Although it is nowhere stated directly by plaintiff, it appears that he is complaining that the union discrimi-

nated against him because of its failure to refuse to comply with the seniority provisions of the collective bargaining agreement between TWA and The International, which governed plaintiff's employment. A violation of those provisions would have been required in order to adjust his schedule with one of the other workers on his shift so that he would be able to observe his Sabbath.

Plaintiff, in arguing that the Unions discriminated against him by "enforcing a collective bargaining agreement which was discriminatory against plaintiff in its application," is arguing that the Union acted wrongly by standing by the contract and refusing actively to support plaintiff's efforts to avoid the seniority provisions of the contract. This actually amounts to an assertion that the Union has a rather stringent duty to accommodate.

The duty to accommodate, which we shall discuss in more detail later in this opinion, at the time the alleged discrimination in this case took place, was required by E.E.O.C. guideline 29 C.F.R. § 1605.1:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation *on the part of the employer* to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. [Emphasis supplied]

The Unions interpret this language to mean that the duty is imposed only on the employer. They argue that that limitation was intentional because, they contend, a union has no power to accommodate. The Union only has power to control its own organization, make collective bar-

gaining agreements with the employer, and enforce those agreements. The employer, the Unions conclude, is the only one who is in a position to accommodate.

We disagree. The language of the regulation does speak in terms of the employer but so have other provisions and regulations pursuant to the Act, which have been interpreted to include the union. For example, 42 U.S.C. § 2000e-2(h), the provision on seniority systems discussed below has been applied to unions. See, e. g., Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).

Furthermore, this case is a perfect example of a situation in which a union could accommodate a member if required to do so. TWA agreed that plaintiff could change shifts if the union approved. Such approval would mean that the union would have to suspend the operation of the seniority rules in plaintiff's case. Had the union made this accommodation, plaintiff would have been able to observe his Sabbath as he wished. The question, however, is whether Title VII imposed upon the unions the duty to ignore their contract under the circumstances of this particular case.

We do not believe that Title VII goes that far. We find and conclude that to require the union to ignore seniority in every case in which an employee with lesser seniority can observe his Sabbath only by changing shifts with a more senior employee would work an undue hardship on the union.

In an article written after Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), Professor Harry E. Edwards and Mr. Joel H. Kaplan expressed concern that the E.E.O.C. regulation imposing the duty to accommodate places an intolerable burden on the employer. They de-

scribed the burden of proving undue hardship as "nearly impossible to demonstrate if the work force is large enough." Edwards and Kaplan, Religious Discrimination and the Role of Arbitration Under Title VII, 69 Mich.L. Rev. 599, 628 (1971). They rightly argue that such an interpretation "imposes a priority of the religious over the secular" in that it might require an employer to favor employees whose religious beliefs require them to follow different schedules than the regular over other employees, even to the point of violating the other employees' bargained for rights. The same considerations apply in the case of the unions.

The labor-management contract to which the union is a party clearly sets out the seniority rules which are binding on the company and the union (Article VI(b), Pl.Ex. 30). That contract, of course, can not operate in violation of the laws of the United States but we do not believe that Title VII requires that the seniority provisions be ignored. Professor Edwards and Mr. Kaplan discuss this problem at length:

> Assume that an employer operates a seven-day-a week operation, that he has entered into a collective bargaining contract with the union, and that the contract provides for shift preference by seniority. What if a low-seniority employee, who works a shift that includes Saturday and Sunday, converts to a religion that requires him not to work on one of those days? Must the employer then transfer this employee out of a Sunday or Saturday shift even though numerous employees with greater seniority are required to work over the weekend? Under the E.E.O.C. guidelines, the transfer of one employee could hardly be said to create an "undue hardship" for the employer, but what of the other employees? What of the hardship imposed

> on the employee who waited a long time to acquire sufficient seniority in order to avoid weekend work and is now forced back into it because of someone else's religious beliefs? Are the religious beliefs of one individual so weighty that they supersede the lack of religious beliefs of another? [69 Mich.L.Rev. at 628].

Professor Edwards and Mr. Kaplan argue that the E.E.O.C. guidelines are confusing and could be construed to require the employer in every case to shift an employee out of seniority to accommodate religious beliefs. We do not believe that the E.E.O.C. guidelines require such a result. The hardship on employees should certainly be considered as hardship on the conduct of business, for the management of employees is one of the chief concerns of a large business and, in the case of a labor union, is the chief concern. A hypertechnical application of the words "undue hardship of the employer's business" by ignoring this fact, would, as Professor Edwards and Mr. Kaplan argue, impose "a priority of the religious over the secular" [69 Mich.L.Rev. at 628] and would perhaps raise constitutional questions.[1] See Dewey v. Reynolds Metals Co., 429 F.2d 324, 334-335 (6th Cir. 1970). We find and conclude, therefore, that it would have been an undue hardship for the unions to have changed plaintiff's shift in violation of the seniority provisions of the labor management contract.

---

1. Professor Edwards and Mr. Kaplan direct attention to Judge Learned Hand's decision in Otten v. Baltimore & Ohio R.R., 205 F.2d 58, 61 (2d Cir. 1953), in which he stated:

> The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.

Finally, with reference to the seniority provisions, we find and conclude that 42 U.S.C. § 2000e-2(h), if not absolutely controlling, at least indicates that Congress did not intend that unions or employers be required to take actions that could impinge upon bona fide seniority systems. That Section reads as follows:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. [42 U.S.C. § 2000e-2(h)].

A significant judicial gloss has been placed on this language by courts processing racial discrimination cases. Consequently, a seniority system can not be "bona fide" if it perpetuates the consequences of past discrimination. In other words, a seniority system is not lawful if it freezes Negroes into past patterns of discrimination. See Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States, 416 F.2d 980 (5th Cir. 1969); and Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D. Va.1968).

Plaintiff does not urge, nor, do we think, may he urge, that the seniority system in this case locked in any discrimination against individuals of plaintiff's or anyone else's religion. The seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern

wherein their freedom to exercise their religion was limited. It was coincidental that in plaintiff's case the seniority system acted to compound his problems in exercising his religion. He did not have sufficient seniority in the building to which he transferred [illegible] to impose his choice of days off over those of [illegible]er employees who had more seniority.

The duty to accommodate under the circumstances of this case, therefore, did not require the union to ignore its seniority system. It did, however, require that the union fairly represent the plaintiff when it became aware of the fact that plaintiff was facing difficulty in scheduling for his Sabbath and that he was in danger of disciplinary action by the company. See Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 988 (D.C.Cir. 1973), and United States v. Bethlehem Steel Corp., 312 F.Supp. 977, 988 (W.D. N.Y.1970), rev. on other grounds, 446 F.2d 652 (2nd Cir. 1971). A union always has an affirmative duty to protect its members from unlawful discrimination in its area of authority, i. e., negotiating a nondiscriminatory contract, Robinson v. Lorillard Co., *supra*; or processing grievances of discrimination, United States v. Bethlehem Steel Corp., *supra*.

In this case, since the collective bargaining agreement was essentially nondiscriminatory, it can only be argued by plaintiff that the unions failed to properly process his grievance. We do not believe that the facts sustain such a charge.

The union first learned about plaintiff's problem at a meeting that Hardison had with Everett Kussmann, Manager, Stores Systems, on September 6, 1968, and at which James Tinder, Local 1650 steward, was present. At that meeting, plaintiff's requirements for time off on religious holidays were discussed and Kussmann agreed that the

steward should seek to swap days off, to excuse time off on specific religious holidays if plaintiff agreed to work on regular holidays, and to attempt to find plaintiff another job (Pl.Ex. 16). There was no evidence that Tinder took any active part in that meeting. After the meeting plaintiff, on October 9, 1968, wrote Kussmann stating his satisfaction in the arrangements discussed and advising Kussmann that he had transferred to the 11 to 7 shift, which did allow him to observe his Sabbath (Pl.Ex. 2).

On December 2, 1968, plaintiff voluntarily transferred from Building 1 where he had sufficient seniority to bid on a shift which would allow him to observe his Sabbath, to Building 2, where he was second from the bottom in seniority.

Kussmann arranged for a meeting to be held on March 6, 1969 to discuss ways to avoid any difficulty that might arise because of plaintiff's new schedule. The Local 1650 steward, Mr. Tinder, was present at that meeting. Apparently several possibilities for meeting plaintiff's requirements were proposed: (1) changing plaintiff's shift; (2) changing plaintiff's job; and (3) allowing plaintiff to work four days a week. Tinder was amenable to working out plaintiff's problem on any of the above bases, subject, however, to the seniority provisions of the contract. On that date there were no jobs open for bid nor did plaintiff have sufficient seniority to bid on any other job (Tr. 168). The seniority provisions, therefore, precluded the possibility of plaintiff's changing his shift (Tr. 82-85, 154-155, 157-169, 193, 225-227). They also prevented plaintiff from changing his job (Tr. 167-168). The company was unwilling to permit plaintiff to work only four days a week (Tr. 270).

Plaintiff, therefore, was not satisfied with the results of this meeting. He did not, however, file a grievance with

the grievance committee as he knew he had a right to do (Tr. 169).

Plaintiff was absent from work on March 8, March 15, and March 22, 1969. On March 21, plaintiff met with A. J. Butcher, Supervisor, Stores Planning and Control, and James Tinder. As a result of that meeting Butcher wrote plaintiff on the same day advising him that a discharge hearing would have to be scheduled (Pl.Ex. 6).

Before the discharge hearing, the grievance committee met with plaintiff for approximately an hour and discussed the possible approaches to resolving the problem. Finally, the grievance committee decided that the best approach would be for plaintiff to remain on the job, pleading for leniency at the discharge hearing, and if that hearing resulted in discharge, to attempt to obtain a reversal of that decision at a higher level (Tr. 385). The possibility of the union waiving its seniority provisions so that plaintiff could get on a different shift was apparently not discussed (Tr. 389-391). Plaintiff told the committee to use its own judgment in presenting the grievance (Tr. 387).

After the meeting, but before the discharge hearing, plaintiff changed his shift to the twilight shift, which permitted him to have Saturdays off. The testimony was that the union believed at this time that its problems were solved (Tr. 391). But on March 28, 1969, plaintiff quit work at sundown and it became immediately apparent that the union would not be able to argue that plaintiff should not be dismissed because his conflicts had been resolved (Tr. 391-392).

Immediately prior to the discharge hearing on March 31, 1969, the union held another meeting with plaintiff and reviewed the various approaches to the problem and the procedures for appealing to District 142 if the company

decided to discharge plaintiff (Tr. 392-393). Plaintiff was told that he should sit next to Earl Box, Chairman of the Grievance Committee, so he could object to any errors made by the Committee.

At the hearing, the union argued against discharge on the grounds that procedural errors had been made and that discharge was too severe a penalty for the infractions with which plaintiff was charged (Joint Stip. 31).

Immediately after the discharge hearing Box again explained the appeals procedure to plaintiff (Tr. 397). On April 12, 1969, a letter was sent to plaintiff explaining that he had been found guilty of insubordination and was therefore, discharged. Several days later plaintiff again met with the Grievance Committee and asked about the possibilities of his resigning to keep his record clean. He was told that the company would probably not accept his resignation and was again told of appeal procedures and that the Local would forward the case to the District (Tr. 398).

Joseph Whitney Bowers, General Chairman of District 142, attempted several times but was unable to contact plaintiff (Tr. 446, 452). He finally arranged two different meetings with plaintiff, through plaintiff's father-in-law, Cyrus See (Tr. 444, 457). Plaintiff failed to make either one of them and Bowers, pursuant to standard procedures, dropped the case (Tr. 405-406).

In light of our findings of fact with regard to the union's actions in processing plaintiff's case, we find and conclude that the unions did not violate their duty to plaintiff under Title VII of the Civil Rights Act of 1964.

The duty of fair representation requires that the union act in good faith and without malice. See Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). We do not find that Local 1650's representation of the plaintiff

in his dispute with TWA was arbitrary, discriminatory, or in bad faith. Any failure on the part of District 142 to pursue the matter after discharge was due entirely to plaintiff's lack of cooperation, which made it impossible to proceed with an appeal. The problem never reached The International. We find and conclude, therefore, that judgment should be entered in favor of the three union defendants.

B. *TWA Responsibility*

Defendant TWA makes several arguments against plaintiff's contention that it violated Title VII of the Civil Rights Act of 1964 when it discharged him:

[1] A statutory requirement to accommodate religious needs of employees would violate the Establishment Clause of the First Amendment.

[2] Title VII of the Civil Rights Act of 1964 does not require employers to affirmatively accommodate employees' religious needs.

[3] TWA made reasonable accommodations to plaintiff's religious beliefs up to the point where further steps would have caused undue hardship.

[4] Plaintiff voluntarily placed himself in a position which he knew or should have known would diminish his chances for Sabbath observance.

[5] TWA did not "intentionally" discriminate against plaintiff on account of his religious beliefs. [Def. TWA Brief, pp. 35-36].

The first question that must be resolved is indicated by # 2 above and that is what kind of duty to avoid religious discrimination did Title VII of the Civil Rights Act of 1964 impose upon TWA. At the time of the acts com-

plained of, 42 U.S.C. § 2000e-2(a)(1) provided, in part, as follows:

> (a) It shall be an unlawful employment practice for an employer:
>
> (1) To fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

The statute did not provide for any duty on the part of an employer to accommodate the religious needs of employees.

The E.E.O.C. regulation which set out the guidelines on religious discrimination, however, provided as follows:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business . . . . [29 C.F.R. § 1605.1(b)].

The question, therefore, becomes whether the E.E.O.C. regulation is a proper interpretation of the Act before it was amended to specifically include a duty to accommodate. TWA cites Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd per curiam by an equally divided court, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971), in support of its position that the Act did not impose a duty to accommodate. In *Dewey*, an employee alleged he had been wrongfully discharged from his employment because

of his religious beliefs. The Court of Appeals held that the trial court had erred in applying the regulation, which was not in effect until July 10, 1967, to the activity of the employee, which took place in 1966. The Court, in Riley v. Bendix Corp., 464 F.2d 1113, 1117 (5th Cir. 1972) expressed the view that *Dewey* offers no guidance on the question of whether the regulation was a valid one because it was not in effect when the acts complained of took place. We agree.

We note further, however, that in *Dewey* the employer offered the plaintiff, as well as all other employees, the option of either working on Sunday or finding a replacement. The plaintiff did find replacements for five Sundays and then refused to find others, claiming that this practice was a sin. The Court of Appeals held that even if the 1967 regulation were applied, the employer made a reasonable accommodation by offering the replacement system.

Finally, *Dewey* was based in large part on the final award of a grievance arbitrator under the labor management contract, which has nothing to do with the question at issue here.

In Riley v. Bendix Corp., *supra*, the Court held flatly that the regulation was valid. It relied in part upon the amendment of the Act, which was approved by the Congress on March 8, 1972. Far from holding that that amendment indicates that the legislative intent of the old Act was not to include a duty to accommodate, as TWA argues we should conclude, the Court in *Riley* held the amendment validated and recognized the regulation as a proper interpretation of the old Act.

The amendment to 42 U.S.C. § 2000e(j) is as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief unless an employer demonstrates that he is unable to rea-

sonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The union's brief refers us to Eighth Circuit cases which state broad principles of statutory interpretation to the effect that amendments to statutes passed for the purpose of correcting a judicial interpretation should be applied prospectively only when Congress intended to change the former law as interpreted by the courts. That principle is obviously correct but defendants ignore the legislative history of the amendment at issue in this case.

The legislative history, reported at 118 Congressional Record, §§ 227-253, includes this statement by Senator Randolph of West Virginia, who sponsored the amendment:

> I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State or local governments. Unfortunately, the courts have, in a sense, come down on both sides of the issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question.
>
> This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. [118 Congressional Record at § 228]

The measure was passed in the Senate by unanimous vote.

The Chairman of the House Committee made this statement about the amendment:

> The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in Dewey v. Reynolds Metals Company, 429 F.2d 325 [324] (6th Cir. 1970). Affirmed by an equally divided court, 402 U.S. 689 [91 S.Ct. 2186, 29 L.Ed.2d 267] (1971). [118 Congressional Record, pp. 1861-1862]

The measure was also passed in the House by unanimous vote.

We find and conclude that the legislative history of the amendment of the Act, together with the fact that weight should be given to the administrative interpretation of the Act, as reflected by the regulation (see Griggs v. Duke Power Co., 401 U.S. 424, 433, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)) indicate that regulation 29 C.F.R. § 1605.1(b) was facially valid and is controlling in this case.

We find TWA's argument that the duty to accommodate an employee's religious beliefs is a violation of the Establishment Clause of the First Amendment to be without merit. Defendant TWA correctly states the test for determination of whether a governmental action violates the Establishment Clause as it was set out in Committee for Public Education and Religious Liberty v. Nyquist et al., 413 U.S. 756, 772-773, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973); (1) that the law must reflect a clearly secular legislative purpose; (2) that the law must have a primary effect that neither advances nor inhibits religion; and (3) that the law must avoid excessive government entanglement with religion. Defendant, however, has not given the Court much guidance as to how the accommodation regulation runs afoul of this test other than arguing that the regulation "clearly places the sanction of law behind religion by facilitating and encouraging employees to take

time off from their jobs for religious observances so that employees with religious beliefs are aided as against non-believers." [Def. TWA Br. pp. 24-25]

It has been well established, however, that not every law that confers an incidental benefit on a religious institution or a person of a particular religion is, for that reason alone, constitutionally invalid. See, e. g., Walz v. Tax Commissioner, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), which held that a state could, consistent with the Establishment Clause, choose not to tax church property. Cf. Luetkemeyer v. Kaufmann, 364 F.Supp. 376 (W.D.Mo. 1973).

The duty to accommodate, as stated in 42 U.S.C. § 2000e(j), reflects the general secular legislative purpose of guaranteeing an employee that he will not be discharged from his job merely because of his religion. Consistent therewith, the regulation also imposed a duty to accommodate. The incidental effect of the regulation perhaps indirectly aids religion but its primary effect is to guarantee job security. The purpose and effect of the law as interpreted by the regulation is not primarily to aid religion but to prevent employers from devising means to discriminate which are not facially discriminatory but which do discriminate in effect and intent.

Finally, the regulation does not involve excessive government entanglement with religion. The regulation simply requires the employer to make affirmative efforts to accommodate the employee's religion. No further involvement is necessary than a judgment by the E.E.O.C. or the court that no such accommodation was made. That is not the kind of entanglement contemplated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971).

We find and conclude, therefore, that the interpretation of Title VII's prohibition of discrimination by reason of religion, as embodied in the E.E.O.C. regulation, 29 C.F.R. § 1605.1(b) does not violate the Establishment Clause of the First Amendment to the Constitution of the United States.

We must now determine whether TWA did in fact take steps to make an accommodation to plaintiff's religious needs. The interpretation of the statute embodied in the regulation requires that the employer show that it was unable to reasonably accommodate the employee's religious observance without undue hardship on the conduct of the employer's business. See, e. g., Riley v. Bendix Corporation, 464 F.2d 1113, 1118 (5th Cir. 1972).

TWA argues that it made three efforts to reasonably accommodate plaintiff's beliefs, that these were not successful from plaintiff's point of view, and that it was unable to make any further efforts. In April, 1968, plaintiff wrote Everett Kussmann, Manager of Stores Systems, asking for Friday sunset to Saturday sunset off (Pl.Ex. 1). In response to that request Kussmann (1) agreed to the union steward seeking to swap or days off; (2) to excuse time off on religious holidays if plaintiff agreed to work on "Christian" holidays if requested; and (3) to attempt to find plaintiff another job (Pl.Ex. 16). On May 7, 1968, the steward reported that he was unable to work out scheduling changes and that he understood that no one was willing to swap days with plaintiff (Pl.Ex. 17). TWA did not take part in the search for employees willing to swap shifts (Tr. 348) and it was admitted at trial that the Union made no real effort (Tr. 346-350). Plaintiff, however, was able for a period of time to work out his day off requirements within the framework of the seniority system (Tr. 214).

On October 4, 1968, plaintiff wrote a letter to Kussmann, informing him that he had worked out his days off requirement by transfer to the 11-7 shift and renewing his request for specific religious holidays off (Pl.Ex. 2). In response, Kussmann reiterated his offer to permit time off on plaintiff's religious holidays whenever possible and requested a list of those holidays (Pl.Ex. 3). On October 20, 1968, plaintiff supplied such a list and expressed his gratitude for Kussmann's "understanding and cooperation" (Pl.Ex. 4).

On December 2, 1968 plaintiff transferred from Building 1, where he had sufficient seniority to maintain a shift in which he could observe his Sabbath, to Building 2, where he was near the bottom of the seniority list and could not be assured a satisfactory shift. His reason for the change was that he was married at that time and a change to Building 2 permitted him to work the day shift and have his evenings free (Tr. 39). On March 7, 1969, a man of less seniority than plaintiff went on vacation and plaintiff was required to work in his position, which required him to work on Saturday (Tr. 39).

Kussmann anticipated difficulties due to the events described above and so arranged a meeting on March 6 with plaintiff and the union steward, James Tinder (Tr. 131). At that meeting Kussmann offered to accommodate plaintiff's religious observance by agreeing to any trade of shifts or change of sections that plaintiff and the union could work out (Tr. 121-132). Any shift or change was impossible within the seniority framework and the union was not willing to violate the seniority provisions set out in the contract to make a shift or change.

TWA claims that any further action on its part would have caused undue hardship to the conduct of its business.

First, had TWA forced another employee to trade shifts or jobs with plaintiff, such action would have violated the seniority provisions of the labor management contract and TWA would have been subjected to personnel problems and grievances (Tr. 157, 193).

Had TWA simply granted plaintiff days off on Saturday it would have left TWA short of help in that position. Plaintiff worked in the Stores Department of TWA's facilities at Kansas City International Airport (KCI). That department is responsible for housing, retaining, and making available parts for use by TWA at its overhaul base at KCI and throughout its system. It operates on a twenty-four hour, seven-day-a-week basis. On weekends TWA worked a minimum number of employees and plaintiff was the only person in his job on his shift during the weekends. To leave that position empty would have impaired the supplying of parts for essential airline operations (Tr. 220, 221, 264, 265, 286, 360, 361). To fill plaintiff's position with someone from another area would deprive that area of its regular manpower (Tr. 221, 262, 293, 294, 362). To bring in a man not working on that day would force TWA to pay premium wages for the time he filled in for plaintiff (Tr. 221, 263, 294).

TWA argues also that if all employees were treated uniformly as to their religious beliefs and observances, it could be very difficult to perform seven-day-a-week airline operations.

We find and conclude that TWA's actions with respect to working out plaintiff's religious observance was a reasonable accommodation by TWA and that any further action by TWA would have worked an undue hardship on the conduct of its business. The duty to accommodate does not require that an employer make every effort short of going out of business to permit his employees to stay on

the job and also to observe their religion. The term "*reasonable* accommodation" (emphasis added) should be read with the term "undue hardship" to arrive at the proper standard.

The duty imposed on an employer by Title VII is not a duty to impose hardships on the rest of his employees or members to accommodate the religious beliefs of a few. It is simply a duty to take affirmative action to try to find a way to permit the employee to observe his religion as he wishes, as opposed to a duty simply not to intentionally discriminate. A study of a very few cases that have decided the question of whether an employer has made a reasonable accommodation does not contradict that construction.

In Jackson v. Veri-Fresh Poultry, Inc., 304 F.Supp. 1276 (E.D.La.1969), plaintiff, a Seventh Day Adventist, was discharged from her position as a chicken picker when she advised the company that she would be unable to work between 5.00 p. m. Friday and 5:00 p. m. Saturday because of the requirements of her religion. There was no evidence that the company made any effort to accommodate her or that it would suffer undue hardship if it did not permit her the time off she requested. The company simply advised her that if she would not work company hours, she would be discharged. The Court found for plaintiff and ordered that she receive back pay.

In Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972), the Circuit Court of Appeals for the Fifth Circuit reversed the decision by the district court, reported at 330 F.Supp. 583 (M.D.Fla.1971), that plaintiff was not entitled to relief because there was no intentional discrimination on the part of the company. The Court of Appeals held that the E.E.O.C. regulation was a valid interpretation of the Act

and that, therefore, the company had the burden of proving that it had attempted to make reasonable accommodations. The Court found no evidence on the record that the employer was unable to reasonably accommodate Riley's religious observance or practice without undue hardship on the employer's business.

In Reid v. Memphis Publishing Co., 468 F.2d 346 (6th Cir. 1972), the Court of Appeals for the Sixth Circuit reversed the decision by the district court that an employer had no duty to accommodate an employee's religious belief. The Court remanded the case with instructions that the trial court consider evidence on the issue of whether the employer could reasonably accommodate plaintiff's religion without undue hardship.

On remand the district court in Reid v. Memphis Publishing Co., 369 F.Supp. 684 (W.D.Tenn.1973) found that the employer had not offered any accommodation to the plaintiff and that no undue hardship would result in permitting the plaintiff, a Seventh Day Adventist, and a copy-reader for the defendant, to have Saturday off. Specifically, the court found that the newspaper had other copy-readers who could take plaintiff's place, that the newspaper's evidence concerning scheduling difficulties, morale problems, and financial burden was not sufficient to show undue hardship. The evidence on undue hardship, the court stated, was not specific and not of the requisite strength to sustain the employer's burden of proof.

In Claybaugh v. Pacific Northwest Bell Telephone Co., 355 F.Supp. 1 (D.Or.1973), the plaintiff was discharged from his job at one of Bell's operations that had a round-the-clock, seven-days-a-week schedule after he joined the Seventh Day Adventist Church and refused to work on his Sabbath, Saturday. The evidence showed that the em-

ployer would encounter difficulties in permanently changing plaintiff's schedule to meet his demands. The court found, however, that the employer had made absolutely no affirmative effort to accommodate plaintiff's religious observance. The company did not try to temporarily accommodate plaintiff, which it was clearly able to do, while attempting to find a permanent solution. It did not look for a possible trade with another employee nor an open position into which plaintiff could move to avoid the conflict with his religious beliefs. The court concluded that Bell had not made a reasonable accommodation.

In none of the cases cited did the employer show that it had taken affirmative action on behalf of the employee. In this case, and in sharp contrast, TWA established as a matter of fact that it did take appropriate action to accommodate as required by Title VII. It held several meetings with plaintiff in which it attempted to find a solution to plaintiff's problems. It did accommodate plaintiff's observance of his special religious holidays. It authorized the union steward to search for someone who would swap shifts, which apparently was normal procedure (Tr. 349). Witnesses for TWA testified that they attempted to work out plaintiff's problems in ways that had proved successful in similar cases (Tr. 305).

TWA would not have been placed in a position where it could not work out plaintiff's problem had plaintiff, to suit his own convenience, not transferred to Building 2 where he had insufficient seniority to bid on a suitable shift. That factor, however, should be viewed as a frustration of TWA's attempts to accommodate, and not as an action which relieved TWA of the duty to accommodate, as TWA argues.

We find and conclude that further accommodation by TWA would have worked an undue hardship on the con-

duct of its business. TWA had two choices for further accommodation: (1) to simply allow plaintiff to take his time off and attempt to replace him; or (2) to force another employee to change shifts.

TWA runs a twenty-four-hour-a-day, seven-days-a-week operation. Plaintiff performed an important job for TWA and was the only person performing his particular job on his shift during the weekend. To replace him with an employee from another area would leave that employee's work crew short. To replace him with an employee who was not regularly scheduled to work at that time would have caused TWA to pay premium wages. Both of these solutions would have created an undue burden on the conduct of TWA's business. Title VII cannot be interpreted to require that companies finance employee's religious beliefs.

TWA is a party to a labor-management contract which clearly sets out a seniority provision which is binding on the company and on the union (Article VI(b), Pl.Ex. 30) With respect to any asserted duty on the part of TWA to change plaintiff's shift in violation of the seniority provisions of the labor-management contract, the same considerations apply here as applied with respect to the union. Title VII does not force TWA to impose upon other employees because of one employee's religious belief. TWA's business includes the administration of its many employees and to impose hardships upon them imposes hardships upon the company's business. We find and conclude, therefore, that it would have been an undue hardship for TWA to have changed plaintiff's shift in violation of the seniority provision of the labor-management contract.

Finally, we again make reference to the seniority provisions of Title VII, 42 U.S.C. § 2000e-2(h), which ex-

empts different treatment to different employees based upon a bona fide seniority system from the other provisions of § 2000e-2 That section, as we stated in reference to the union's duty to accommodate, indicates that Congress did not intend that unions or employers be required to take actions that would impinge upon bona fide seniority systems.

For the reasons stated, we find and conclude that neither TWA nor any of the three unions violated Title VII of the Civil Rights Act of 1964 by reason of its discharge of plaintiff for his refusal to work on his Sabbath. Accordingly, it is

Ordered that the Clerk of the Court enter judgment for defendants.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-763

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., *Petitioners*

v.

LARRY G. HARDISON, ET AL.

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 29, 1976.

/s/ HARRY A. BLACKMUN
Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 8th day of March, 1976.

APPENDIX D

AGREEMENT

BETWEEN

TRANS WORLD AIRLINES, INC.

AND

THE MECHANICS AND RELATED EMPLOYEES
IN THE SERVICE OF

TRANS WORLD AIRLINES, INC.

AS REPRESENTED BY

INTERNATIONAL ASSOCIATION OF MACHINISTS

AND

AEROSPACE WORKERS

Article II

Scope of Agreement

(a) The Company agrees all work generally recognized as mechanical inspection work, mechanic's work, and helper's work performed in and about Company shops, major stations, overhaul bases, line service stations, and other Company facilities, including but not limited to mechanical work involved in dismantling, overhauling, repairing, fabricating, assembling, welding, and erecting all parts of airplanes, airplane engines, radio equipment, electrical systems, heating systems, hydraulic systems, and machine tool work in connection therewith, and including the dismantling, repairing, assembling, and erecting of all machinery and mechanical devices and automotive and building maintenance and repair work, the work of Fire Inspectors, the work of Store Clerks, and the work of Ramp Servicemen in the handling of stores stock, commissary supplies, mail, express, cargo, and freight is recognized as coming within the jurisdiction of the International Association of Machinists and is covered by this Agreement.

* * *

(c) It is agreed that all work covered by this Agreement shall be performed by employees in the classifications specified herein, except that at other than major stations or overhaul bases on shifts where there is not sufficient work as herein described for Ramp Serviceman to justify the assignment of an employee coming within such classification, any employee who is in the same or higher pay bracket may be assigned to do the work. At stations other than major stations or overhaul bases on shifts where Ramp Servicemen are assigned and there is not sufficient work to justify the assignment of an additional employee in such classification, any employee covered by the Agreement who is in the same or higher pay bracket may be assigned

to do the work. Except at overhaul bases, employees in the same or higher pay bracket may be assigned to do the work of Fire Inspectors where there is insufficient Fire Inspector work to justify the assignment of an employee so classified.

The number of employees in each classification will be established by the Company in accordance with the normal requirements of the service. Employees will normally perform the work of their classification; however, it is recognized that at major cities (1) where more than the scheduled number of flights are on the ground at one time, (2) in cases of emergency where it is necessary in order to maintain operating requirements, or (3) where work within their regular classification is not available any employee who is in the same or higher classification may be assigned to the performance of work normally performed by the classifications of Ground Service Helper, Fleet Service Helper, Ramp Serviceman, or Janitor. In this event it is understood, however, that employees outside the classifications covered by this Agreement will not be assigned to perform this work if employees in the same or higher classifications covered by this Agreement are available and can be assigned without interfering with their regular duties. When an employee is assigned the work outside his classification, another employee in a different classification shall not perform the regular duties of the employee so assigned. If the Union doubts the fairness of the assignment, it may invoke the grievance procedure for settlement of the matter.

The total mechanical work force and the number of mechanics necessary in each specialty will be established in accordance with the normal work-load requirements. Mechanics will confine their work to their specialty except (1) when work within their own specialty is not available, mechanics may be assigned to

any mechanical work; and (2) during abnormal operating conditions mechanics may be assigned to any work in the same or lower pay classification other than that to which they are normally assigned, to the extent necessary to maintain flight schedules, even when work within their regular assignment is available.

• • •

ARTICLE IV

Classifications of Work

• • •

(b) Stores Classifications

(1) Stores Clerk

A Stores Clerk will do all work generally recognized as the routine duties of a Stores Clerk in and about the Company storerooms and stockrooms. The duties of a Stores Clerk shall include the delivering of parts and materials at overhaul bases and other places where mechanics do not accomplish this work. The duties of a Stores Clerk shall also include the driving of trucks in transporting stores supplies.

(2) Lead Stores Clerk

A Lead Stores Clerk will be familiar with all the duties of a Stores Clerk and will be capable of performing all such duties and will perform such duties if directed by the Company. In addition, he will be a working leader of a group.

(3) Receiving Inspector

A Receiving Inspector will be capable of inspecting and will inspect material received by the receiving section when inspection is required or assigned. It is understood that these employees will not do any work recognized as mechanics' work.

• • •

ARTICLE VI

Seniority

* * *

(b) The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.

* * *

(g) General:

* * *

(4) Except as hereafter provided in this paragraph, seniority shall apply in selection of shifts and days off within a classification within a department at a point. During the first ninety (90) days of their employment, probationary employees may be assigned such shifts and days off as determined by the Company. Seniority may be exercised only in case of bumping due to a reduction in force or when an opening occurs. At locations where seven (7) or more employees are assigned to the daylight shift, members of the Union's Local Committee designated in accordance with Article XI (a) (1) shall have preference of assignment to such shift and preference of assignment to Saturday and Sunday off, provided that such member has the ability to perform, in a satisfactory manner, the work required of the particular job. Such preference shall continue only during the respective terms as Committeemen and only so long as they are assigned to fixed shifts. At locations where employees work rotating shifts, members of the Union's Local Committee shall have preference of assignment to Saturday and Sunday off. In preparing days off and shift schedules, the Company

will determine how many employees are needed based on the type of work needed and the classification.

An employee who is notified that his shift and/or days off preference has been accepted and then refuses to accept such assignment will not be permitted to bid for a different shift and/or days off assignment for six (6) months after such refusal This shall not apply at any location where shift and day off preference are solicited verbally. An employee may withdraw his bid at any time prior to the time the local Union representative is notified of an opening.

* * *

ARTICLE VII

Hours of Service

* * *

(b) Forty (40) hours, consisting of five (5) eight-hour days, worked within seven (7) consecutive days, midnight Sunday to midnight Sunday, will constitute a standard work week. Each employee will have two (2) consecutive days scheduled as regular days off in each work week, and the only deviation from this practice of two (2) consecutive days off will be where under the local schedule adopted, it is found necessary to rotate scheduled days off and in order to repeat the schedule, deviation is necessary. At overhaul bases, every reasonable effort will be made in the future to arrange work schedules to allow Saturday and Sunday as regular scheduled days off. The fixing of a work schedule allowing part of the employees of a facility Sunday of one week and Monday of the following week as regularly scheduled days off will not be deemed a violation of this provision. Five (5) days' notice must be given of change in the schedule of days off.

* * *

Article VIII

Overtime and Holidays

(a) Overtime rate of time and one-half, computed on an actual minute adjusted to the nearest tenth of an hour basis with a minimum of one (1) hour overtime, shall be paid for all work performed in excess of eight (8) hours in any one day, for all work performed either in advance of or after regularly scheduled hours, and for the first eight (8) hours worked on one of the two regularly scheduled days off each work week.

* * *

(d) Employees covered by this Agreement will observe the following holidays: New Year's Day, Washington's Birthday, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day. Should any of the foregoing holidays fall on a Sunday, the following Monday shall be considered as the holiday, and should any of the foregoing holidays fall on a Saturday, the preceding Friday shall be considered as the holiday. Any employee required to work on any of the foregoing holidays shall be compensated at the rate of double time and a half.

* * *

(g) Except in an emergency, an employee will not be required to work overtime against his wishes.

* * *

Article XIX

Shift Premiums

* * *

(c) The Company and the Union may, at any point, change from fixed to rotating shifts, or vice-versa, by mutual agreement.

The Company may establish relief schedules which require employees to work on different shifts in order

to provide day off and vacation relief for other employees. In establishing rotating vacation relief schedules every effort will be made to avoid rotation between shifts during the work week. Except as provided in Article II(c), a rotating relief employee(s) shall not perform work out of his classification. The rotating relief shall have two consecutive days off each week and shall not rotate shifts more often than twice each week. An employee on a relief schedule who does not rotate between shifts during his work week shall be paid shift premiums in keeping with paragraph (a) and (b) of this Article, as applicable. An employee on a relief schedule who is scheduled to work on the day and afternoon shifts during a work week shall receive sixteen (16) cents per hour above the day shift rate for all shifts worked. An employee on a relief schedule who is scheduled to work on the (1) afternoon and night shifts, (2) day and night shifts, or (3) day, afternoon and night shifts during a work week, will receive twenty-one (21) cents per hour above the day shift rate for all shifts worked. Relief positions shall be bid and filled in accordance with Article VI.

—o—